

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP755

Cir. Ct. No. 2011CV1266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

US BANK, NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

ROBERT R. NELSON AND HIROKO NELSON,

DEFENDANTS-APPELLANTS,

JOHN/JANE DOE,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County:
FRANK REMINGTON, Judge. *Reversed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Robert Nelson and Hiroko Nelson appeal an order of the circuit court granting summary judgment in favor of U.S. Bank, National Association in this mortgage foreclosure case. On appeal, the Nelsons argue that the affidavits submitted by U.S. Bank in support of its summary judgment motion fail to aver that the affiants have personal knowledge of the procedure by which the records attached to the affidavit were created. For the reasons set forth below, we reverse the order of the circuit court.

BACKGROUND

¶2 U.S. Bank filed this foreclosure action against the Nelsons with respect to a mortgage on real property located at 2 Woodridge Court in the City of Madison, Dane County, Wisconsin. U.S. Bank filed a motion for summary judgment and, in support of the motion, submitted the affidavits of Andrew Zbaracki, U.S. Bank's attorney, and Marcia Allen, an employee of Wells Fargo Bank, N.A. We need not detail the Zbaracki affidavit because, as explained below, we reverse on the basis that the Allen affidavit is insufficient under *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶21, 324 Wis. 2d 180, 781 N.W.2d 503, and the Zbaracki affidavit does not supply the missing averments.

¶3 The Allen affidavit states, in relevant part:

In the regular performance of my job functions, I am familiar with business records created and maintained by [U.S. Bank] for the purpose of servicing mortgage loans. These records (which include data compilations, electronically imaged documents, and others) are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by [U.S. Bank]. It is the regular practice of [U.S. Bank]'s mortgage servicing business to make these records. In connection with making this affidavit, I have acquired personal knowledge of the

matters stated herein by personally examining these business records.

¶4 The Nelsons objected to reliance on the affidavit on the ground that Allen does not allege that she has personal knowledge of how the records were created, thus failing to satisfy the hearsay exception for business records and failing to authenticate the computer records from which the figures came. The circuit court granted summary judgment in favor of U.S. Bank after a hearing. The Nelsons now appeal.

DISCUSSION

¶5 On appeal, the Nelsons maintain that the Allen affidavit is inadmissible because it fails to establish that Allen has personal knowledge of how the attached records were created.¹ U.S. Bank argues that the Allen affidavit is admissible under the business records exception to the hearsay rule and that summary judgment was appropriate. *See* WIS. STAT. § 908.03(6). We review the circuit court's grant of summary judgment *de novo*, employing the same methodology as the circuit court. ***Palisades***, 324 Wis. 2d 180, ¶9. Employing that methodology, we agree with the Nelsons that the Allen affidavit fails to meet the requirement, under ***Palisades***, 324 Wis. 2d 180, ¶20-21, that a records custodian who is testifying to establish admissibility of business records must be qualified to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity. *See* WIS. STAT. § 908.03(6). *See also Bank of*

¹ The parties both cite unpublished decisions to support the arguments in their briefs. The unpublished decisions are not precedent and, therefore, we do not consider them. *See* WIS. STAT. § 752.41(2) and RULE 809.23(3) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

America NA v. Neis, 2013 WI App 89, ¶22, 349 Wis. 2d 461, 835 N.W.2d 527. We reverse the order of the circuit court on that basis.

¶6 We note, as an initial matter, that the Allen affidavit avers that Allen is an employee of Wells Fargo, whereas this foreclosure action was initiated by U.S. Bank. However, the substance of the Allen affidavit is more important than the specific details of who employs Allen and what her title is. We stated in *Palisades* that a custodian or other qualified witness does not need to be the author of records or have personal knowledge of the events recorded in order to be qualified to testify to the requirements of WIS. STAT. § 908.03(6) as to those records. *Palisades*, 324 Wis. 2d 180, ¶¶22-23. Rather, we concluded that the witness must have personal knowledge of how the records were made so that the witness is qualified to testify that they were made “at or near the time [of the event] by, or from information transmitted by, a person with knowledge” and “in the course of a regularly conducted activity.” *Id.*, ¶20; see WIS. STAT. § 908.03(6). The Allen affidavit lacks an averment of such personal knowledge about how the records were made.

¶7 In her affidavit, Allen provides enough information to support a fair inference that her position with Wells Fargo allows her to be familiar with the attached records and how they are *maintained*. What the affidavit is missing, however, is a clear averment stating that Allen knows how the records were *created*. Allen avers only that she is “familiar with business records created and maintained” by U.S. Bank, without even suggesting that she is familiar, from any source or by any method, how they were created. The inference that, when one is familiar with records, one automatically has knowledge of how those records were made is too much of a stretch. See *Palisades*, 324 Wis. 2d 180, ¶22.

¶8 We now address a separate argument by the Nelsons and explain why we reject it. The Nelsons also argue on appeal that a certified copy of the assignment of mortgage that was submitted by U.S. Bank to the circuit court is inadmissible because it was not properly authenticated. Specifically, the Nelsons assert that U.S. Bank did not present sufficient evidence that Michael Snively, the person who executed the assignment of mortgage on behalf of Mortgage Electronic Registration Systems, Inc. (MERS), did so in the presence of Taehooney Chin, the notary who attested to Snively's signature.²

¶9 When the Nelsons raised a related argument in the circuit court, they submitted the affidavit of Robert Nelson, which had attached to it a copy of Chin's signature card on file with the Office of Vital Statistics of Anoka County, Minnesota. The Nelsons argued that Chin's signature on the assignment of mortgage did not match his signature on the signature card on file with the county. The circuit court concluded that the Nelsons had raised an "infinitesimally" small question of fact regarding Chin's signature. The court allowed U.S. Bank to submit an affidavit from Chin. U.S. Bank did so, and the Chin affidavit stated that Chin's signature appears on the assignment and that Snively was known to him to be the person who signed the assignment on behalf of MERS. The Nelsons argued that a genuine issue of material fact remained because Chin's affidavit did not

² The Nelsons did not raise the question of whether Snively signed the assignment of mortgage in Chin's presence at the time they raised the argument that Chin's signature did not match the signature card he had on file with the county. Thus, the issue that U.S. Bank was asked to clarify by submitting the Chin affidavit did not involve the issue of whether Snively signed the assignment in Chin's presence. There is an argument, then, that the "presence" issue was forfeited because the Nelsons did not raise it earlier. However, the forfeiture argument is not raised in the respondent's brief.

contain an averment that Chin was in Snively's presence when Snively executed the assignment, as required by Minnesota law.

¶10 However, the Nelsons do not support their argument with any specific facts that would show the presence of a genuine material dispute. *See Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶35, 254 Wis. 2d 77, 646 N.W.2d 777 ("mere conjecture" is insufficient to satisfy nonmoving party's obligation to oppose summary judgment by advancing specific facts showing the presence of a genuine material dispute). There is a reasonable inference raised in the averments of Chin's affidavit that Chin was present when Snively signed the assignment of mortgage. The inference proposed by the Nelsons—that Chin must not have been present when Snively signed the assignment simply because the affidavit does not state that fact expressly—is not a reasonable one and, thus, we reject the Nelsons' argument that the assignment was inadmissible.

¶11 In sum, we reverse the circuit court's order granting summary judgment in favor of U.S. Bank on the basis that the Allen affidavit does not satisfy the requirement under *Palisades*, 324 Wis. 2d 180, ¶21, that a records custodian testifying to establish admissibility of business records must be qualified to testify from personal knowledge both that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

